

WITNESSES/EVIDENCE

The prosecution does not request any evidence or witness be produced for this response. The prosecution respectfully requests that the Court consider the Chronology and the Court's Ruling on Due Diligence dated 25 June 2012. *See* AE CLXXVII.

LEGAL AUTHORITY AND ARGUMENT

The Rules of Practice Before Army Courts-Martial, dated 26 March 2012, (hereinafter "Rules of Practice") state that "[s]peedy trial motions will contain a stipulated chronology of dates and events to which the parties agree and, if needed, a separate chronology from each party for those dates and events as to which there is no agreement." Rules of Practice, Rule 3.2; *see also* Rule for Courts-Martial 707(c)(2) ("[u]pon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case"). Pursuant to these rules, the parties agreed and the Court ordered the prosecution to submit its Chronology to the defense for the purpose of stipulating to all agreed upon dates and events. *See* AE CCLIXVI.

The prosecution submitted the Chronology, as ordered, to the defense on 26 September 2012. Instead of responding with the dates and times to which the defense would stipulate, the defense responded with yet another motion. In its motion, the defense requests that the Court order the prosecution to disclose its *Ex Parte* Due Diligence Motion because the Chronology fails to provide the specificity of "what was being done during [certain] time period[s]." Defense Motion for *Ex Parte* Filing at ¶ 8. The defense further argues that the Chronology is insufficient because it fails to explain the prosecution's diligence, does not assist the defense in narrowing its witnesses for speedy trial, and is not readily searchable. *See* Defense Motion.

Based on the information the defense requested and the incorrect information provided by the defense in their motion, it appears the defense has not reviewed the Chronology to determine what information was provided by the Government. *See id.* at 3 (the defense quotes a certain action and states that it was used "a total of 547 times" when that action was not recorded more than half of the defense's claim). Additionally, the defense made similar claims in emails to the Court where they changed the facts, but still were patently misstating the contents of the Chronology. *See* Enclosure 1. Furthermore, the prosecution has not even filed its response to the Defense Speedy Trial Motion. This request is, therefore, both untimely and inefficient.

In an attempt to justify its request, the defense argues the Chronology includes "a significant amount of irrelevant 'filler'" material to include "work being done by other entities such as CCIU" and "requests by defense counsel." *Id.* at ¶ 7.¹ The Chronology, however, includes those events to identify exactly what was being done during those periods. The defense apparently dismisses the fact that interagency coordination and responding to more than one hundred defense requests (to include this very Motion) required prosecutorial action, thus, a fact the Court may consider in its determination as to whether the accused received a speedy trial. Furthermore, by stating that the requests by defense counsel and thus the prosecution's response to the defense's constant requests are "filler," the defense is stating that their own requests did not assist in moving the case forward.

¹ Should the defense believe these events are truly irrelevant for speedy trial purposes; the defense is free to stipulate to those events and instead focus its efforts on those events it believes are relevant.

Second, the defense argues that the *Ex Parte* Due Diligence Motion puts the Chronology into context. The prosecution's response to the Defense Speedy Trial Motion will put the Chronology into context, since the final chronology is an enclosure to the actual response. If the defense would review the Chronology and the upcoming Response, instead of attempting to delay the process by requesting an *ex parte* motion and attempting to obtain a different version of the Chronology, then the defense would be prepared to argue the Defense Speedy Trial Motion. The defense's request seems to be nothing more than an attempt for additional time to prepare a reply brief to the prosecution's forthcoming response to the Defense Speedy Trial Motion, without filing for a continuance, and without giving the prosecution adequate time to respond to the 117 page motion.

The defense proffers a series of questions that the defense claims the Chronology fails to answer. Those questions are verbatim from the Court's Due Diligence Ruling. *See* AE CLXXVII. One question is what the prosecution has disclosed to the defense. The defense is perfectly able to answer that question from all the previous discovery disclosures, the unclassified and redacted government MRE 505(g)(2) filings, and from the accounting of those disclosures on the Chronology. The other questions focus on whether the prosecution has been diligent. The purpose of the Chronology is not to argue diligence; instead, the purpose of the Chronology is to outline actions or events that occurred for the parties to stipulate to or contest. *See United States v. Laminman*, 41 M.J. 518 (C.G.Ct.Crim.App. 1994) (encouraging "parties to enter into a stipulation of fact as to the undisputed portions and then to present evidence on those relevant matters upon which there was disagreement"); *see also* Rules of Practice, Rule 3.2; RCM 707(c)(2). The prosecution's diligent movement of the case will be discussed in the prosecution's response to the Defense Speedy Trial Motion.

The defense also argues the prosecution's *Ex Parte* Due Diligence Motion is necessary for the defense "to narrow the scope of required witnesses for the Speedy Trial Motion." Defense Motion at ¶ 10. The Chronology lists dates when the prosecution coordinated with the sixty-three government organizations to obtain their accountings of damage, if any. The Chronology is, in fact, the most detailed accounting of the prosecution's time in existence. The Chronology provides ample information for the defense to narrow its witnesses for its Speedy Trial Motion.

Much of the chronological information contained in the *Ex Parte* Due Diligence Motion will be incorporated into the response to the Defense Speedy Trial Motion. However, the prosecution also included information in its *ex parte* motion that either it does not have the authority to disclose to the defense or may not be an issue for speedy trial. It is the prosecution who bears the burden of persuasion for speedy trial issues and it is the prosecution that must strategically determine how much of its work product to divulge. *See* RCM 905(c)(2)(B). It is the Court that determines whether the prosecution carried its burden. *See* RCM 905.

The defense also requests an electronic, text-searchable version of the Chronology, so that the defense may "readily search the chronology for the critical issues." *Id.* at ¶ 9. The prosecution will produce a searchable version of the Chronology PDF. The original version of the chronology is in Excel format, meaning the document both is text-searchable and capable of being altered. However, the original version of the chronology is classified and is work product of the prosecution that includes additional information for each entry which either the prosecution intends to memorialize in its response to the Defense Speedy Trial Motion or guided the prosecution in composing the Chronology. The Chronology was produced from printing the unclassified, non-work product information in the Excel worksheet to a PDF format and then transferring that file to

NIPRNET from a classified system. The text-searchable PDF will allow the defense to search for key words, as requested, and should neither be used by the defense as a substitute for reviewing the Chronology in its entirety and stipulating to undisputed entries, nor should it be used for the defense to create yet another Chronology in lieu of attempting to agree to a singular version of the Chronology for the Court.

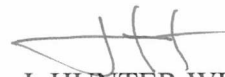
CONCLUSION

For the reasons stated above, the United States respectfully requests this Court deny the Defense Motion for *Ex Parte* Filing for being premature, inefficient, and unsupported by any rule or legal precedent.



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I certify that I served or caused to be served a true copy of the above on Defense Counsel via electronic mail, on 2 October 2012.



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2 Enclosures

1. Email Chain, 27 September 2012
2. Text-searchable PDF of Government Notice for Speedy Trial Chronology, 26 September 2012